Filed 4/9/10 In re D.B. CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re D.B., a Person Coming Under the Juvenile Court Law.	C062849
SHASTA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. T.Z., Defendant and Appellant.	(Super. Ct. No. 08JVSQ2751101)

The mother timely appeals from an order terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 395; all further statutory references are to this code.) She contends the juvenile court erred by not giving her adequate reunification services, and her trial attorney was incompetent because he failed to file a petition showing change of circumstances. We shall affirm.

BACKGROUND

The Shasta County Department of Social Services (Department) filed a petition in June 2008, alleging that the minor, 10 days old, fell within the jurisdiction of the

court for several reasons. First, the mother's substance abuse placed him at risk of harm; specifically, the mother used drugs during her pregnancy and the minor was being treated for withdrawal symptoms. Second, the mother had mental health problems that impaired her parenting ability. Third, the mother lived with a registered sex offender, who had victimized the mother when she was a small child. Fourth, the mother had lost custody of *five other children* due in part to her substance abuse problems, and despite prior drug treatment, she continued to use drugs.[1]

The detention report, filed the same date as the petition, states the mother was born in 1977 and neither of the possible fathers could be found. The minor was in neonatal intensive

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[1] Section 300, subdivision (b) provides, in part, for dependency jurisdiction when: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child . . . due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

Section 300, subdivision (j) provides for dependency jurisdiction when: "The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child."

care "due to respiratory distress, hypoglycemia, and withdrawal symptoms." The mother had been in custody in Oregon during her pregnancy, but was released on May 15, 2008, and moved to Redding shortly thereafter. She tested positive for THC, the active ingredient in marijuana, on May 29, 2008, and at the minor's birth. The mother had told hospital staff that, because of depression and posttraumatic stress disorder, she had taken 60 milligrams of Prozac *daily* during her pregnancy, except for the last month when she ran out of the drug after moving to California; at that point, she began using her mother's 20-milligram Prozac prescription, but wanted her dosage increased. The minor "was experiencing withdrawal symptoms. The infant's withdrawal scores continued to increase so he was prescribed methadone to help wean him of [*sic*] the medication." The mother began using marijuana at age *eight* and had been a daily user of marijuana, heroin, methamphetamine, and cocaine. However, she claimed to have stopped using all drugs—"with the exception of marijuana"—in 2007, and claimed she last used marijuana around May 18, 2008. In 2002 and 2005 the mother had completed "outpatient drug/alcohol treatment programs." Her other five children had been taken away from her because of her drug use. The mother is a registered sex offender, as are her stepfather and her brother: she and her brother were abused by their stepfather; as an adult, she had had sex with a 14-year-old boy; and her brother had had sex with a 14-year-old girl.

Because of the mother's "long history of substance abuse, the multi-generational family history of sexual abuse, [the

mother's] mental health problems, and the infant's display of withdrawal symptoms," the Department sought detention and planned to refer the mother to drug treatment, parenting classes, and a mental health assessment. On June 23, 2008, the trial court ordered that plan to be implemented.

On June 30, 2008, a substance abuse counselor made recommendations for the mother's drug treatment and recommended that the mother "have her mental health needs assessed by a provider that specializes in psychiatric care."

The jurisdictional report was filed on August 8, 2008. It included the result of a meconium test, not available at the time of the detention report, showing that the minor had suffered "a sustained exposure to THC in utero." The report states the mother completed drug programs in 2002 and 2005, but thereafter relapsed.

The jurisdictional report also provided details about the mother's five other children, all taken from her in part because of her persistent drug use. The mother lost parental rights to two children, A.B. and J.H., because of her substance abuse problems and failure to complete family reunification services. In 2004 she tested positive for drugs at the time of the birth of another child, and in 2007, because of drug use and mental health problems, she lost custody of three children she had with her husband—A.B.Z., D.B., and E.B.[2]

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[2] The mother's husband—and the father of the three children removed in 2007—is not the father of the minor in this case.

On September 8, 2008, the Department changed its recommendation to "no services." A "disposition report" explaining this change was filed on October 27, 2008. In part, it states: "Based on [the mother's] long history of drug use, mental health problems, history of fleeing, and CFS [children and family services] history, a risk assessment was conducted and there are no reasonable services that would prevent removal of the child. [The mother] was referred" for an alcohol and drug treatment program, parenting classes, "and for a mental health assessment at Shasta County Mental Health. [¶] . . . [¶] Based on the mother's long history of substance abuse, the sibling abuse, the multi-generational family history of sexual abuse, the mother's mental health problems, the parents' criminal histories, and the infant's display of withdrawal symptoms, this infant remains in need of the continued protection of the [juvenile court] and placement in a permanent foster care home."

Attached to this report were records showing that between June 24, 2008 and October 2, 2008, the mother missed one drug test and tested positive for marijuana six times, and for opiates three of those six times.

An addendum report contained Oregon documents showing that petitions to terminate the mother's rights to her two older children, A.B. and J.H., had been dismissed in 2004 after she relinquished her parental rights.

At the jurisdictional/dispositional hearing on October 31, 2008, the mother testified. She claimed she stopped using

heroin on September 11, 2001, had not used cocaine since she was 18 or 19, and had not used methamphetamine for over a year. She admitted she had been incarcerated during part of her pregnancy and had taken Prozac as prescribed by a doctor, and admitted that at other times during her pregnancy she used marijuana because she was not getting the Prozac. She was no longer residing with her stepfather, a registered sex offender. She testified she was in mental health and drug counseling, but had not completed parenting classes, in part because of transportation problems. The mother admitted missing many substance abuse classes, but claimed this was due to her moving from her stepfather's house. However, even since the move her attendance at drug classes had been sporadic, and she blamed her depression for this.

A letter from a mental health counselor, Tammy Allan, was admitted into evidence. It states the mother had been receiving counseling since August 8, 2008. Tammy Allan was an "L.C.S.W." and the behavioral health program director of the Hill Country Community Clinic. The letter outlines the mother's case plan, including weekly individual therapy, and "Tak[ing] prescribed psychotropic medications and meet[ing] regularly with psychiatric care provider" at the clinic.

No objections to the jurisdictional report were interposed. The mother's counsel argued that she had never been referred for mental health services, but no *evidence* supporting that claim was introduced at the hearing. Instead, as stated, the mother

testified she was receiving mental health services, and this was documented by her counselor.

Judge Bigelow sustained jurisdiction, denied reunification services, and set a permanency hearing (§ 366.26) for February 6, 2009.

The mother then filed a petition for extraordinary writ in this court, arguing that reasonable reunification services had not been provided, specifically, that the mother's mental health had never been assessed "'by a provider that specializes in psychiatric care'" as had been recommended by the substance abuse counselor on June 30, 2008. The petition acknowledged that the mother had received mental health counseling since August 8, 2008, as described in the letter from Tammy Allan, but argued this did not qualify as "psychiatric" services.

This court summarily denied the writ petition on the merits. (*T.Z. v. Superior Court* (Dec. 23, 2008, C060386) [petn. den. by order].)

The Department filed its permanent plan review report (§ 366.26) on January 26, 2009, stating the minor was likely to be adopted by the family he had been placed with since July 8, 2008—a "mature, responsible couple" who had previously adopted two infants, now aged 10 and 13.

On July 29, 2009, the Department filed an addendum report. The minor continued "to thrive in his current foster care placement." During a monthly visit with the mother, the minor cried and "looked throughout the visit for the foster

parent. . . . When the foster parent returned to the room, [the minor] sought her out and stopped crying."

At the hearing on August 7, 2009, the mother testified she had continued with drug and mental health counseling. She believed she could care for the minor and believed it would be in his best interest because "the child should be with his parents." The mother submitted letters substantiating her claims of progress, including Tammy Allen's written opinion that her improvements "are substantial and with continued supportive services, it is expectable that she will be able to effectively provide" for the minor, and a letter from another counselor indicating her marijuana abuse was "in remission" and "She is actively engaged in psychotherapy."

No objections to the Department's report were interposed. Judge Gaul found adoption was in the minor's best interests and terminated the mother's parental rights. The mother timely appealed.

DISCUSSION

I

At the jurisdictional/dispositional hearing on October 31, 2008, the court found reasonable services had been provided up to that point and ordered no further services to be provided. The mother contends adequate services were not provided "between detention and disposition because she was not provided with

appropriate mental health services." We disagree with this contention.[3]

The purpose of reunification services is to correct the conditions that led to removal of the dependent minor. (*In re Joanna Y.* (1992) 8 Cal.App.4th 433, 438.) The social worker must make a good faith effort to provide reasonable services responding to the unique needs of each family "in spite of the difficulties of doing so or the prospects of success." (*In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777.) "[T]he record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained *reasonable* contact with the parents during the course of the service plan, and made *reasonable* efforts to assist the parents in areas where compliance proved difficult[.]" (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414.)

In evaluating the reasonableness of services, "[t]he standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances." (*In re Misako R.*

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[3] The Department asserts the mother forfeited this claim. We disagree. Mother's counsel adequately objected at the jurisdictional hearing that the mother had not been referred for mental health services. Further, the mother raised this issue in her writ petition, preserving it for this appeal. (See *In re Kenneth M.* (2004) 123 Cal.App.4th 16, 18, fn. 2.) In such a case, she retains "her appellate remedy (§ 366.26, subd. (*l*)(1)(C)) but is limited to the same issue on the same record (§ 366.26, subd. (*l*)(1)(B)) and thus is destined on appeal to receive the same result." (*Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1514.)

(1991) 2 Cal.App.4th 538, 547.) "We must view the evidence in the light most favorable to the department and indulge all legitimate and reasonable inferences to uphold the order." (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010.)

At the detention hearing on June 23, 2008, the juvenile court ordered the mother to be referred for drug treatment, parenting classes, and a mental health evaluation, as recommended by the Department.

As early as June 30, 2008, the next week, a drug counselor had evaluated the mother and made recommendations, including that the mother "have her mental health needs assessed by a provider that specializes in psychiatric care." The disposition report states the mother had been referred for a mental health assessment, as well as drug treatment and parenting classes. However, the mother had tested positive for both opiates and marijuana since the detention hearing. At the jurisdictional/dispositional hearing, the mother submitted a letter from a counselor describing her mental health treatment plan.

Despite this evidence in the record, the mother claims that she never received an adequate mental health assessment. It is true that her attorney made this claim at the hearing. But the record shows that a licensed clinical social worker—the "Behavioral Health Program Director" at a local clinic—began therapy with the mother on August 8, 2008. Contrary to the mother's claim on appeal, the fact this therapist did not explicitly state she was seeing the mother *pursuant to* the court

referral does not mean this was an unrelated therapeutic relationship. Viewing the record in favor of the finding that reasonable services had been offered, this satisfied the terms of the mental health referral. That is the clear tenor of the jurisdictional report, and the mother did not introduce any *evidence* to the contrary. In fact, as stated, the mother testified she *had* been receiving mental health services, and the nature of those services was described by a letter from her counselor.

The mother points out that a substance abuse counselor evaluated her on June 30, 2008, and in part stated the mother had a history of mental health problems, including depression, and "It is recommended that she have her mental health needs assessed by a provider that specializes in psychiatric care." On appeal, the mother states, "No referral to such a provider was ever made." But this ignores the fact that the mother thereafter established a therapeutic relationship with a mental health provider, who in part described a case plan providing for psychiatric services. The juvenile court could rationally infer this was sufficient evidence to show reasonable reunification services addressing the mother's mental health problems had been offered.

The mother appears to claim a referral to a *psychiatrist* was required. The drug counselor did not recommend a *psychiatrist*, but instead "a provider that specializes in psychiatric care." That recommendation did not compel the provision of a psychiatrist. As stated, Tammy Allan's letter

indicated the mother was seeing a "psychiatric care provider" at the clinic. There was no evidence that whatever mental health care the mother was receiving was inadequate because of the qualifications of the providers.

The mother points to later letters stating she began psychotherapy on November 8, 2008, and by February 5, 2009, was reportedly "making excellent progress" and had "solidified" her commitment to abstaining from drug abuse. The mother claims she "had turned herself around, and her participation in her treatment programs was consistent and beneficial." Even if true, this took place *after* reunification services were denied at the October 31, 2008, jurisdictional/dispositional hearing. That evidence was not before the court when it made the finding that reasonable services had been offered, and does not show that the prior services had been unreasonable.

Finally, the *primary* reason for dependency was the mother's life-long, severe, and multiple drug use, even after two prior drug treatment programs in 2002 and 2005. The mother used drugs while pregnant with this minor. The minor was born addicted. The mother repeatedly used drugs while receiving reunification services after the detention hearing in this case. Her claim that additional mental health services would have fixed her drug problem—and therefore ameliorated the conditions leading to dependency—lacks support in the record.

Accordingly, the record supports the juvenile court's finding that reasonable reunification services were offered.

II

The mother contends trial counsel was incompetent because he failed to file a petition showing changed circumstances, specifically, that during the period between the denial of services on October 31, 2008, and the permanency plan hearing on August 7, 2009, the mother made "significant" strides, in that she had been drug free, had progressed in mental health therapy, and had visited the minor as frequently as allowed.

A parent claiming incompetence of counsel has the burden to show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that a better result would have been obtained had counsel acted differently, that is, "demonstrable prejudice." (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1540-1541; see *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.) The mother cannot satisfy either prong of this standard. First, an attorney cannot be faulted for declining to file a futile motion. As this court stated in the context of a criminal case: "It is not incumbent upon trial counsel to advance meritless arguments or to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel." (*People v. Constancio* (1974) 42 Cal.App.3d 533, 546.) Second, because a petition to modify was destined to fail, the record does not show any demonstrable prejudice.

"Under section 388,[4] a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden to show, by a preponderance of the evidence, there is a change of circumstances or new evidence, *and the proposed modification is in the child's best interests*." (*In re A.S.* (2009) 180 Cal.App.4th 351, 357, italics added; see *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of such a petition is within the discretion of the juvenile court. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

The following factors should be considered in determining a section 388 petition: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 (*Kimberly F.*).)

On this record, the mother cannot establish that trial counsel performed deficiently by failing to file a modification petition. Appellate counsel paints the record in the light most

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4 Section 388 partly provides: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a).)

favorable to the mother, contending that she was well on her way toward recovery from the problems leading to dependency. But trial counsel could rationally have concluded that the relevant factors weighed heavily against the mother, and therefore a modification petition would have been futile. Specifically, the mother's drug problems are life-long, with multiple relapses, including after the detention hearing, and mother has no bond with the minor, who had a bond with the adoptive parents.

The mother contends that the strong bond the minor had with the adoptive family cannot govern the juvenile court's consideration of the "best interests" of the minor. This may be technically correct, but as the mother herself acknowledges, such bonding, while not dispositive, is a significant factor the juvenile court must consider. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Even though the mother may have been sober for months before the permanency hearing, that does not mean her drug problem was over. Her apparent laudable progress was insignificant given her past. As stated in a similar case: "Mother and father both have extensive histories of drug use and years of failing to reunify with their children. Their recent efforts at rehabilitation were only three months old at the time of the section 366.26 hearing. [Citations.] Although parents were exerting themselves considerably to improve, they did not demonstrate changed circumstances. Even if parents had succeeded in doing so, there was no showing whatsoever of how the best interests of these young children would be served by

depriving them of a permanent, stable home in exchange for an uncertain future." (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 (*C.J.W.*).)

Further, as stated, the minor was in a stable home. "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*).)

Section 388 does provide "an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 528; see *Marilyn H.*, *supra*, 5 Cal.4th at p. 309 ["a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status"].) But a petition that "would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.)

In part, the mother blames the Department for causing a delay between the jurisdictional/dispositional hearing and the permanency hearing, held over nine months later, because of purported mistakes in serving the alleged father with notice. She speculates that had she been receiving additional services

during that period, she could have improved her condition even more than she managed to. This does not show a reasonable likelihood of a more favorable result had a petition been filed. First, it does not increase the chance that such a petition would have been granted; second, it is speculation to infer she would have made substantially greater progress toward fixing the problems that led to dependency in this case, and the loss of five other children. (See *C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.)

The mother heads a somewhat rambling constitutional claim. First, she notes the following passage: "Essentially, *Marilyn H.* teaches us that section 388 *really is* an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation.] As such, section 388 is vital to the *constitutionality* of our dependency scheme as a whole, and the termination statute, section 366.26, in particular." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 528.) Next, the mother contends: "This constitutionally vital escape mechanism doesn't work in the situation of an infant removed from a parent at birth." But this does not establish a *constitutional* problem.[5] A parent whose child has been removed at birth has the same right to file

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[5] In her reply brief the mother chastises the Department for not responding to her constitutional claim. However, the claim is so muddled that we cannot fault the Department.

a section 388 petition as any other parent. The difference is that in many such cases, the parent has demonstrated such woefully deficient conduct—such as using drugs during pregnancy, leaving in their wake an addicted child—that the parent may have more rehabilitation to complete before any change of circumstance is deemed substantial. Thus, the problem such a parent faces is not a structural problem with the statutory scheme, but a factual problem arising from life circumstances.

Here, the mother's life-long drug use, loss of five other children, multiple drug relapses, and continued drug use between the detention and jurisdictional/dispositional hearing show that the apparent rehabilitative steps made in the months between that hearing and the permanency hearing, while laudable, did not make it *in the minor's best interests* for him to be denied a stable home. "Childhood does not wait for the parent to become adequate." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

Accordingly, the mother has not shown that trial counsel was incompetent in failing to file a futile motion to modify.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

CANTIL-SAKAUYE, J.